United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-2037

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA
ex rel. PAUL ROBINSON,

Petitioner,

-against-

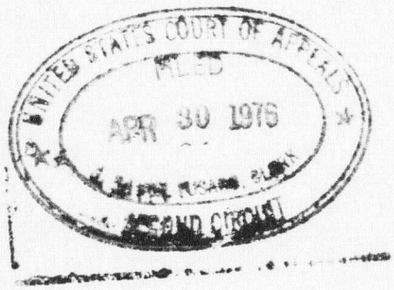
WARDEN AUBURN CORRECTIONAL FACILITY,
State of New York, District Attorney,
Kings County, State of New York,

Appellees.

On Appeal from the United States District Court, Eastern District of New York

B
P/S

Appellant's Brief



RONALD KLEINBERG
Attorney for Petitioner
575 Lexington Avenue
New York, N. Y.
Tel. (212) 486-9788

DICK BAILEY PRINTERS, 290 Richmond Ave. S.I., N.Y 10302
Telephone: (212) 447-5358

TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. T-5891

UNITED STATES OF AMERICA ex rel.
PAUL ROBINSON,

Petitioner - Appellant,

-v-

WARDEN AUBURN CORRECTIONAL FACILITY,
State of New York, District Attorney,
Kings County, State of New York,

Respondent.

On Appeal from the United States District Court
For the Eastern District of New York

BRIEF IN BEHALF OF APPELLANT ROBINSON

PRELIMINARY STATEMENT

Paul Robinson (Petitioner - Appellant), appeals from an order of the Honorable Jacob Mishler entered in United States District Court Eastern District on March 10, 1976, which denied the Petitioner's

habeas corpus writ. On April 12, 1976, the Honorable Jacob Mishler granted a certificate of probable cause certifying that substantial issues are present in this case for review by the United States Court of Appeals for the Second Circuit.

The Petitioner's conviction stems from an indictment filed in the Supreme Court of the State of New York, County of Kings, on September 15, 1972, which charged the Petitioner with the crimes of murder (two counts) attempted robbery in the first degree (two counts) and attempted Grand Larceny in the third degree (two counts).

On October 11, 1972, a trial was commenced in the Supreme Court of the State of New York, County of Kings, before the Honorable Justice John Starkey. The Jury was unable to reach a unanimous verdict on all the counts of the indictment. On March 21, 1973, a second trial on the aforesaid charges was again commenced before the Honorable Justice John Starkey. The Jury found the defendant guilty of the crimes of murder in the first degree, attempted robbery in the first degree and attempted Grand Larceny in the third degree. On May 8, 1973, the Honorable Justice John Starkey sentenced the defendant to a term of imprisonment of fifteen years to life on the murder charge and ten years on the attempted robbery charge. The sentences for the

murder conviction and the attempted robbery conviction were to run cuncurrently. The defendant was given an unconditional discharge on the grand larceny conviction.

This conviction was appealed to the Appellate Division of the Supreme Court, Second Judicial Department, 43 A.D. 2d 908, 351 NYS 2d 647 (2nd Dept. 1974) (aff'd without opinion),and to the New York Court of Appeals, 36 N.Y. 2d 224, 367, N.Y.S. 2d 208 (1975).

On July 10, 1975, the New York Court of Appeals denied the Petitioner's application for re-argument, but granted his application to amend the Remittitur. The Court amended the Remittitur to read:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the constitution of the United States, viz: whether the defendant was denied Due Process of Law when the Trial Court charged the Jury with respect to an alleged affirmative defense. This Court held that there was no violation of defendant's constitutional rights."

BACKGROUND

On August 13, 1971 Germaine Philips was shot and killed while she was in Lincoln Terrace Park, located in Brooklyn, New York. At the time of the shooting, she was in the company of one Alberto Greene, her boyfriend. Mr. Greene indicated that the shooting occurred in the course of an attempted robbery of his person. He stated that three men came into the park where he and Germaine Philips were located, and one of the men took out a gun and asked him for his money, and the other brandished a knife, while the third was unarmed and didn't say anything. Greene refused to hand over his money and attempted to escape with his girlfriend. In the course of their attempted flight, Germaine Philips was shot and killed.

Shortly after this incident, Mr. Greene identified the individual with the gun as Rudolph Mills and identified the party who brandished the knife as Glen Darien. Both of these men were arrested and charged with the crime of murder. They were later tried in Supreme Court, Kings County before the Honorable Justice John Starkey for the murder of Germaine Philips and were found guilty.

On the date of sentencing, Paul Robinson, 16 years of age (Petitioner-Appellant), appeared outside the Courtroom and spoke to New York City Detective Iannuccilli, the arresting officer and the detective assigned to the case. Paul Robinson broke down and

cried before Detective Iannuccilli, and told him that the men who were about to be sentenced for the murder of Germaine Philips were in fact innocent. He indicated that he was in the park at the time of the shooting, and was in fact the party whom Greene had described as the third person who did not possess any weapons. He identified the two perpetrators of the crime as Glenford Jackson (called George) and a second individual known only as "Gargo". He further stated that although he met Gargo and George inthe park, he did not know that they were about to commit the crime of robbery against Alberto Greene. After giving this statement to Detective Innuccilli, Paul Robinson was arrested and subsequently indicted for the murder of Germaine Philips.

Because of Robinson's statement, the District Attorney of Kings County, Eugene Gold, made an application before Justice Starkey on August 23, 1972 to set aside the guilty verdict against Rudolph Mills and Glen Darien. Judge Starkey granted this application.

It is respectfully submitted that without the courageous action of Robinson in coming forward and exculpating Mills and Darien, his own conviction would not be before this Honorable Court.

STATEMENT OF FACTS

The Prosecutor relied on three witnesses, Alberto Greene, Rudolph Mills and Detective Iannuccilli, to prove the charges in the indictment.

TESTIMONY OF ALBERTO GREENE

On August 13, 1971, Alberto Greene was with Germaine Philips (the deceased) in Lincoln Terrace Park. While they were in the park, three men approached them, walked past them, stopped, came back, and then surrounded them. One of the three men pointed his hands towards Greene's face and told Greene to empty his pockets. Greene grabbed his pocket and said he didn't have any money [A17].

At this time, he heard a click on his right side and noticed a man with a knife. Greene backed up against a wall and noticed that the man who originally asked him for the money had produced a gun and pointed it at Greene's stomach. This man then fired the gun. Greene heard a click and started to run with Miss Philips. He ran with her, going between the man on his left (Robinson) and the man in front of him [A19]. When Greene started to run, he heard a loud noise and then noticed that Miss Philips was bleeding; he continued to run out of the park.

In describing the position and movement of the defendant, Greene was asked the following question [A24-25]:

Q: Mr. Greene, the fellow without any weapon, he didn't stop you did he?

A: He couldn't stop me.

Q: But he made no attempt to stop you, did he?

A. Well look, I ran through him, I don't know if he raised his hand, I don't know.

Q: You don't know what he did. You don't know whether he jumped back in surprise or what, do you?

A: No.

Q: All you know is that he moved.

A: That's all I know, he moved toward the wall.

Q: You weren't paying any attention to him, you were worried about the man with the gun, weren't you, Mr. Greene?

A: Exactly.

TESTIMONY OF DETECTIVE PHILIP IANNUCCILLI (Direct)

On August 14, 1971, Detective Iannuccilli arrested Glen Darien and Rudolph Mills for the murder of Germaine Philips. Shortly after he arrested Darien and Mills, on August 19, 1971, he contacted Paul Robinson and questioned him about the murder. He questioned Robinson on numerous occasions after this and on

May 30, 1972, Robinson told him that "Gargo" was one of the men involved in the shooting and that he was dead. On May 31, 1972, Iannuccilli had a lengthy conversation with Paul Robinson over the phone and asked Robinson if he would meet him in the Supreme Court on that date for the sentencing of Darien and Mills [A29]. When he met Robinson in the Supreme Court Building on the ninth floor, he showed him photographs of "George" and of "Gargo" and asked Robinson to identify them. After looking at the photographs, Robinson started to make inquiries about what would happen to Darien and Mills. Iannuccilli replied that it would help if the third person who was there would come forward. After talking in this vein for a while, Robinson broke down and started to cry. He then identified the photographs as being "Gargo" and "George", and stated that "Gargo" and "George" were guilty of the murder of Germaine Philips and that Darien and Mills were innocent. Then, according to Detective Iannuccilli, Robinson related to him the events that occurred on the day of the murder. Robinson stated that he was with "Gargo" and "George" on the night of the homicide. He stated that George had a gun and did the shooting and that Gargo had the knife. He went on to say that he had left a house he was visiting on Rogers Avenue and was on his way home when he met Gargo and George. Robinson then told Iannucilli that he was in Lincoln Terrace Park with Gargo and George when they

said that they were going to look at prostitutes and pimps. In the park they saw Germaine Philips and Alberto Greene. Robinson then stated that George asked Greene to empty his pockets and then George fired the gun (A29 - 31).

Iannuccilli testified that after hearing these statements from Robinson, he arrested Robinson and advised him of his rights; then asked him if he would go to the District Attorney's office and make the same statements. On the way to the District Attorney's office, Iannuccilli asked Robinson if he would continue his story and Robinson replied that he wasn't sure if he could trust Iannuccilli, but he nevertheless told Iannuccilli that "they were looking for a prostitute and a pimp" and upon being asked why, he responded "To Take Them Off" [1] (A34). Robinson then went to the District Attorney's office with Detective Iannuccilli. At the District Attorney's office Robinson gave a complete statement pertaining to the events of that day. This statement was introduced at trial by the prosecution and marked as Exhibit #2. [2]

---

1. Judge Cooke, in the New York Court of Appeals Opinion, supra, erroneously attributed this remark to mean that Robinson along with Gargo and George wanted 'to take them off.' Yet, it is very clear that Robinson surmized that "they" meaning Gargo and George, wanted to 'take them off' and he, Robinson, did not indicate that he himself wanted to "take any one off".

2. In the transcribed statement given by Robinson to the Assistant District Attorney, marked as Exhibit #2, nothing is mentioned about taking off anybody, and, in fact, Robinson disavows any advance knowledge of the robbery and his participation in it.

CROSS EXAMINATION

Iannuccilli indicated that he knew that Paul Robinson was the third person in the park early in his investigation [A36]. He mentioned that on one occasion when he spoke to Robinson at his house he told Robinson that he would do what he could for him if Robinson would supply him with some information [A38].

Iannuccilli conceded that after Robinson told him on May 31, 1972, that "they were looking for a prostitute and a pimp to take them off", Iannuccilli did not give this information to the Assistant District Attorney handling the case, who was walking with them, to the District Attorney's office (A42). He also conceded that he was present when yet another Assistant District Attorney questioned Robinson and that during this time Robinson did not state anything concerning the "taking off" of a prostitute and a pimp (A43).

TESTIMONY OF RUDOLPH MILLS

Rudolph Mills was originally arrested along with Glen Darien for the murder of Germaine Philips. At the time Mills testified for the prosecution, he was still incarcerated in Civil Jail and was told by the Assistant District Attorney that after he testified against Robinson, the charges against him for murder would be dropped [A62].

Mills testified that on August 12, 1971, he was at 104 Rogers Avenue in Brooklyn, New York. When he arrived there,

there were "four or five dudes" in the house by the names of West, Barrick and Rufus (A53). Around 10:30 in the evening, Gargo and George came to the house. Paul Robinson came to the house alone about an hour later. Mills testified that he overheard the following conversation:

> "Paul and Gargo were having a conversation about going to look for money before they left the house. I was cooking and I asked if you needed something before they went out. Somebody, I don't know who, was it, say' we can wait. We are urgently in need of some money so they left."(A54)

Mills also testified that Paul told him that George had a gun before Robinson left the house [A54].

TESTIMONY OF PAUL ROBINSON

The defendant testified that when he was in Lincoln Terrace Park with Gargo and George he was unaware that they possessed any weapons or that they had any intentions of committing any unlawful acts.

Robinson testified that he first saw Gargo and George that day at 104 Rogers Avenue in Brooklyn. He went to this address upon the invitation of Rudolph Mills. When he arrived at the house, Gargo and George were already on the premises, situated in the rear of the house. Robinson spent the evening in the front of

the house with Mills. He did not converse with either Gargo or George while in this abode. He indicated that he left the house alone and met Gargo and George while walking towards the subway on his way home. The three of them traveled on the subway together and got off at the Utica Avenue stop. When they left the subway station, they heard music coming from Lincoln Terrace Park. George then asked Robinson if he was going over to the music festival at the Park. Robinson then walked with Gargo and George to the park. During the walk towards the park, the conversation centered around girls and dancing.

When they arrived in the park, Robinson separated from the two of them. He remained alone in the park for about fifteen minutes, and then decided to go home. He started walking through the park when he heard the voice of either Gargo and George calling him. Both Gargo and George walked towards him and when they got next to him told Robinson that they were going to look for prostitutes.

Robinson then noticed a man and a woman embracing against the wall of the park. George and Gargo walked towards them, and Robinson followed about two yards behind them. They passed the couple and when Robinson noticed that the woman was not a prosti-

tute, he continued to walk about twenty yards past them and decided to go home. George and Gargo were in front of him and he told them he was going home. He turned around and started walking again towards his home, when Gargo and George passed him and were walking at a fast pace. Gargo and George walked in front of Greene and Philips, and then George spun around and pulled out a gun. At that time, Robinson didn't know it was a gun, but he heard a click and saw Gargo taking out a knife. Robinson then gave the following account of what transpired [A95]:

> "Greene started to move slowly to my direction, I remember moving towards the fence. I could have make a move at that time, but I don't recall moving against the wall.
>
> * * *
>
> "The girl ran towards me and left Mr. Greene alone with Gargo and George, saying that 'move, and let me cut him'.
>
> * * *
>
> "Well, before that, George had said to Mr. Greene that he was to give up everything and Mr. Greene replied something - objected to it - like he said, 'you have to take it'. (A96)
>
> * * *
>
> "Mr. Greene was coming towards me but he had to do it in such a way that they didn't shoot at him, like if he was to run, he didn't want to take a chance, at least that's I think. So he was coming back taking step by step.

"Mr. Greene put his right hand towards his back pocket - I didn't know if he was reaching for a weapon or he was trying to protect (himself). At this time, I was moving towards the fence and *** [A97] Greene was still against the wall and trying to sneak out slowly ***because like the gun was on him and Gargo had his hand up with the knife. When the girl was shot she was going back towards Mr. Greene."

Then Robinson was asked the following questions and gave the following answers (A97):

Q: So she had passed you and she was returning. Now, when this happened, what did you do?

A: I stand up and I moved away. I remember moving far back out of the way as possible. I remember touching the fence.

Q: And then did you say anything or do anything when the girl was shot?

A: When shot(s) started to fire, I was directly numb.

After this incident, Robinson testified that he went back to 104 Rogers Avenue and awoke Mills and told him what had transpired [A102]. He then indicated that the reason why he didn't reveal what occurred before May 31st was that he was afraid that he would be killed by either Gargo or George.

POINT I

THE DEFENDANT WAS DENIED DUE PROCESS OF LAW UNDER BOTH THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT ERRONEOUSLY CHARGED THE JURY THAT THE DEFENDANT HAD ASSERTED AN AFFIRMATIVE DEFENSE IN A NEW YORK FELONY MURDER PROSECUTION AND WHEN IT CAST UPON THE DEFENDANT THE BURDEN OF PROVING THAT AFFIRMATIVE DEFENSE BY PROOF BEYOND A REASONABLE DOUBT. THIS ERROR NEGATED THE DEFENDANT'S PRESUMPTION OF INOCENCE, ERROREOUSLY REDUCED THE PROSECUTION'S BURDEN OF PROOF AND IMPROPERLY COMPELLED THE DEFENDANT TO PROVE HIS INNOCENCE.

The defendant testified in his own behalf at the trial and asserted his innocence of the crimes charged in the indictment and unequivocally denied his knowledge of, and participation in, the attempted robbery of Alberto Greene. In reviewing the testimony of the defendant in its charge to the jury, the Court completely nullified and negated this testimony and the defendant's defense by instructing the jury that the defendant had asserted an affirmative defense under the New York Felony Murder Statute and had the burden of proving this defense by proof BEYOND A REASONABLE DOUBT. The defendant did not assert an affirmative defense and it was grievous error, which amounted to a denial of due process of law, for the Court to instruct the jury that this defense was raised by the defendant. [3]

3. In People v. Robinson, 36 N.Y. 2d 224 (1975), the New York Court of Appeals stated that the Trial Court "in at least two places misstated a fact by informing the Jury that defendant had interposed an affirmative defense. There was no basis in fact for that statement since the defendant had denied all knowledge of and participation in the underlying crimes." (Emphasis added).

By charging the jury that the defendant had asserted an affirmative defense, the Court, by necessity, declared that the defendant had admitted he was a participant in the underlying felony. In making such a declaration, the Court improperly removed from the Jury's consideration the most important question of fact in the trial; whether the defendant knew about, and participated with, Gargo and George in the alleged criminal activity. While the affirmative defense is a defense to felony murder, it is at the same time a self-admission to the defendant's participation in the underlying felony. Thus, the party asserting this defense must be classified as the "accomplice to the felon". R. Denzer and P. McQuillan, Practice Commentary, McKinney's Cons. Laws of New York, Penal Law Sec. 125.25; People v. Bornholdt, 33 N.Y. 2d 75, 350 N.Y.S. 2d 908 (1973). It will be demonstrated that this error by the Trial Court was of constitutional dimension, violating one of the most sacred and fundamental rights guaranteed to a defendant at a criminal trial; the right to be presumed innocent of the charges against him.

The following is the language used by the Court in explaining the Felony Murder Doctrine and the affirmative defense provisions in the New York Murder Statute:

> "The People have the burden of proving the defendant guilty beyond a reasonable doubt except to what we call an affirmative defense, which I will get to you later. (A156) (Emphasis Added).

"The People must prove that a homicide took place. And then comes the question of, what kind of a homicide was it, a murder, was it a manslaughter, and the law provides, gentlemen, that a person is guilty of murder when, acting alone or with one more other person, he commits or attempts to commit robbery, and in the course of and in furtherance of such crime or immediate flight therefrom, he or another participant, if there by any, causes the death of a person other than one of the participants."

"In other words, it doesn't have to be an attempt to cause any death. If death results in the commission or the attempted commission of a robbery, then you have a murder." [A157]

"The People have the burden of proving the defendant guilty beyond a reasonable doubt 'except in certain instances', and I read to you the section about a person being guilty of murder when, acting alone or with one other person he commits or attempts to commit robbery and in the course of and in furtherance of such crime or of immediate flight therefrom, he or another participant, if there by any, causes the death of a person other than one of the participants." [A163]

"Then, the law goes on to read, except that in any prosecution under this subdivision in which the defendant was not the only participant in the underlined crime, as an affirmative defense, the burden of proving this is on the defendant, that the defendant, one, did not commit the homicidal act or in any way solicit, request, command or importune or aid the commission thereof, and that he was not armed with a deadly weapon or any other instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by a law abiding person. And that he had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance and further that he had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious injury."
(Emphasis Added)

"I told you that the burden is on the People to prove the defendant guilty beyond a reasonable doubt, but the defendant has the burden of proving all of those elements of his affirmative defense and the burden of proving an affirmative defense rests upon the defendant. That means that it must be established by a fair preponderous of the credible evidence that the claim that the defendant makes is true." [A164]

* * *

"The law requires that, in order for a defendant to prevail, the evidence that supports his affirmative defense must appeal to you as more clearly representing what took place than opposed to his claim. If it does not and the weight is so evenly balanced that you would be unable to say which evidence has the greatest weight on either side, then you must resolve the question in favor of the People, because it is only if the evidence favors the defendant's claim the evidence opposed to it, that you can find in favor of the affirmative defense for the defendant. You understand the fact that he has interposed this affirmative defense."

"Now the burden of proving an affirmative defense is, as I say, on him."

"The burden of proving that he participated in this crime, that he was acting in concert, is on the People. In other words, if he were there with the intent to commit a crime and participates in it with that intent, then he is guilty, if you are satisfied as to that beyond a reasonable doubt."

"On the other hand, if you are satisfied beyond a reasonable doubt that he was there, that he intended to participate, but he did not know that one of his fellows was armed -- and there was no proof that he, here, himself committed a homicide -- no proof that he was armed but he must prove that he had no reasonable ground to believe that any other participant was armed and that he had no reasonable

(Emphasis Added)

> ground to believe that any other participant intended to engage in this conduct. The burden of proving that is on him. That's if you are satisfied beyond a reasonable doubt that he was not a mere spectator, if you are satisfied beyond a reasonable doubt that he was not." (A-164-165)

The Court's explanation of the Felony Murder Doctrine was poorly phrased and could only have the effect of confusing and misleading the Jury in respect to applying that doctrine to the facts in the case. In addition, overwhelming prejudice results from the fact that the Court even instructed the Jury concerning the existence of the "affirmative defense" and the alleged assertion of that defense by Robinson.

The United States District Court in denying the Petitioner's habeas corpus application, found that the affirmative defense charge did not constitute a transgression of fundamental constitutional guarantees since neither 'the statute nor the Court's charge' required the defendant to admit the commission of the underlying felony in order for him to assert his affirmative defense. It is most respectfully submitted that the District Court erred in its opinion since both the New York Statute and the Court's charge requires a defendant to admit his culpability to the underlying felony in order for him to raise this defense.

The revised New York Penal Law drastically changed the

Doctrine of Felony Murder by including in the body of the Statute an affirmative defense which is made available to the defendant in an appropriate situation.[4] The affirmative defense attempts to limit an accomplice's culpability by extending to an accomplice an opportunity to fight his way out of a felony murder charge by persuading a jury that he had nothing to do with the killing itself.

The affirmative defense statute was enacted, according to the drafters, to mitigate the harsh results of the rigid automatic envelopment of all participants in the underlying felony in the murder charge. The provision afford the non-killer an opportunity to prove that the homicide was not within the scope of the criminal agreement but at the same time the non-killer admits his guilt to the underlying felony. [5]

Thus, the party asserting this defense attempts only to mitigate the severity of his punishment, by convincing the Jury by a preponderance of the evidence, that he had no involvement

4. New York Penal Law Section 125.25 provides, "It is an affirmative defense that the defendant: (A) did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and (B) was not armed with a deadly weapon or instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and (C) had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and (D) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."

5. Proposed New York Penal Law Commission Staff Notes at 338 (McKinney Spec. Pamph. (1964)).

in the murder itself. Yet, to take advantage of this defense, the defendant must admit his culpability to the underlying felony.

Since it is conceded that Robinson did not assert the affirmative defense, the Court's charge had the devasting effect of finding him guilty in respect to the underlying felony, despite his denials. It also placed the burden upon the defendant to prove his innocence of the murder charge.

There was no basis in fact for the Court to instruct the Jury on the affirmative defense doctrine in this case. Such a doctrine would have been properly presented if the defendant testified that he entered the park with Gargo and George with the intent to commit the crime of larceny, but did not realize that his confederates were likely to commit serious physical injury. However, Robinson denied any knowledge of such intent and the instructions by the Court concerning the affirmative defense were wholly improper and seriously prejudicial to the defendant. [6.]

The prejudice results from the fact that the instructions tended to reinforce and solidify the culpability of the defendant by indicating to the Jury that Robinson had admitted participating in the underlying felony. The Jury is then deprived of its

---

6. In the defendant's first trial, the same Judge did not instruct the Jury pertaining to this affirmative defense, and that Jury was unable to reach a verdict.

function; it must find that the defendant is guilty of the underlying felony. Hence, the charge improperly declared that the defendant admitted his guilt to the underlying felony, which, perforce required the defendant to come forward to persuade the jury of his innocence to the murder charge. This requirement deprived the defendant of a fair trial. In Re Winship, 397 U.S. 358, 90 S. Ct. 1068, L. Ed. 2d 568 (1970); Stump v. Bennet, 398 F. 2d 111 (8th Cir. 1968), cert den'd. 393 U.S. 1001.

The constitutional impediment in such an instruction is that it derogates against the accused's presumption of innocence. Instead of the Jury being expressly told that the defendant is presumed innocent of all charges and that the burden is solely upon the Prosecution to remove this presumption by offering the required quantum of proof; the Court solidifies the culpability of the defendant by telling to the Jury that Robinson had admitted his participation in the underlying felony. Thus, without completing ignoring the Judge's charge, the Jury could not have acquitted the defendant of the underlying felony.

Secondly, the instructions by the Court infringed upon the defendant's presumption of innocence when it unjustly shifted the burden of proof upon him to prove an essential element of the crime for which he was charged. Stump v. Bennet, supra. It is a violation of due process to place the burden of

persuasion upon the defendant to prove the same issues which the prosecution must prove in its direct case. Speiser v. Randall, 357 U.S. 513, 78 S. Ct. 1337, 2 L.Ed. 2d 146 (1958). After the Trial Judge in this case finished reading the affirmative defense statute, he attempted to explain its meaning to the Jury, and in so doing, he improperly allocated to the defendant the burden of proving the same elements of the crime which the Prosecution was required to prove. For example, the Court instructed the Jury that,

> "the burden of proving that he participated in the crime *** is on the people". (A165)

Yet, in the same breath, the Court indicates that,

> "in order for the defendant to prevail *** (A164) ("Robinson") must prove that he had no reasonable ground to believe that any other participant was armed and that he (Robinson) had no reasonable ground to believe that any other participant intended to engage in this conduct.[7] The burden of proving that is on him." (A165)

By such an instruction, the defendant was required to prove the same elements of the crime which the prosecution must prove in order to establish its prima facie case.

In Stump v. Bennet, supra, the Eighth Circuit found that an Iowa statute requiring the defendant to prove the affirmative defense of alibi placed upon the defendant the burden of proving the same elements of the crime as the State and therefore this

7. Conduct must refer to acts which were necessary to complete the underlying felony of robbery.

statute violated the defendant's Fifth and Fourteenth Amendment rights of Due Process of Law.

The Eighth Circuit found that this affirmative defense mandated the defendant to disprove an essential element of the crime, in that the alibi related to the presence of the defendant at the scene of the crime. Since the Court found that proof of the defendant's presence and participation was an indispensable factor of the Government's case, it struck down the Iowa Statute and held that the Statute destroyed the defendant's presumption of innocence by requiring him to prove his absence from the scene of the crime. The Court noted, at page 116:

> "By shifting the burden of proof to a person who claims to have been elsewhere at the time of the crime, there is created an irrational and arbitrary presumption of guilt. It arises not by reason of proof of fact from which a fair inference might be drawn, but from the mere happening that the defendant offers testimony in an attempt to establish innocence. When this occurs, unless the defendant can succeed in over-balancing the State's evidence, the Jury is expressly told he cannot be acquitted by reason of his sole claim to innocence." (Emphasis Supplied).

The same constitutional impediments which beset the Statute in the Stump case, supra, are prevalent in the case at bar. In this case, the Court misinterpreted the meaning and import of a Statute which was designed to mitigate punishment of

a defendant and used the language of the statute to destroy the defendant's presumption of innocence, and of necessity reduced the Prosecution's burden of proof.

Thirdly, the charge by the Trial Court violated the teachings of the United States Supreme Court as enunciated in In Re Winship, 397 U.S. 358, 90 S. Ct. 1086. 25 L. Ed. 2d 568 (1970) and its progeny, Cool v.United States, 409 U.S. 100, 34 L. Ed 2d 335, 93 S. Ct. 354 (1972); Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed 2d 508, 95 S. Ct. 354 (1975).

The United States Supreme Court in the case of "In Re Winship", found that when a Trial Court diminishes the requirement of finding a defendant's guilt beyond a reasonable doubt, it violates the Due Process clause of the Fifth Amendment of the United States Constitution. In Re Winship, supra, the United States Supreme Court specifically held that a Judge presiding over a trial in a juvenile delinquency proceeding could not find the juvenile guilty by evidence

which was sufficient under a preponderance of evidence standard but insufficient to convict under a "beyond a reasonable doubt standard."

The Court stated in the opinion:

> "The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence -- the bedrock "axiomatic and elementary' principal whose enforcement lies at the foundation of the administration of our criminal law.
>
> "Moreover, use of reasonable doubt standard is indispensable to command the respect and confidence of the community in application of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in a doubt whether innocent men are condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.
>
> "Lest there remain any about about the constitutional statute of the reasonable doubt standard, we explicitly hold that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute a crime with which he is charged."
> (Emphasis Supplied).

By examining the underlying interests justifying the application of the reasonable doubt standard in Winship, it becomes evident that those same interests compel the application of the reasonable doubt standard to the facts of this case. The practical effect of the charge to the Jury in this case was that it obligated the Jury to find each and every element of the crimes charged

without requiring those elements to be proved by the State beyond a reasonable doubt.

The Court declared that the defendant asserted an affirmative defense, as previously stated, this declaration means that the defendant intentionally aided George and Gargo in the commission of the underlying felony. Once this "fact" was established by the Judge in his charge to the Jury, it was then only a short step for the Jury to find that the murder charge of of necessity, must also have been proven. Let us look closely at the language of the Court. The Court in attempting to explain the felony murder doctrine states:

> "The people must prove that a homicide took place. **** The law provides, gentlemen, that a person is guilty of murder when acting alone or with one more other person, he commits or attempts to commit robbery, and in the course of and in furtherance of such crime or immediate flight therefrom, he or another participant, if there by any, causes the death of a person other than one of the participants ***if death results in the commission or the attempted commission of a robbery, then you have murder." (A157)

Thus, after declaring that the defendant asserted an affirmative defense, which means that he participated in the

underlying felony, the Court then without any further explanation, states that if a death results from the commission of the felony, the defendant is guilty of murder. Thus, this portion of the charge directly violates the Winship Rule, because it directs the Jury to convict even though there might have been insufficient evidence to establish guilt beyond a reasonable doubt.

Thereafter, in its charge, the Court not only places the burden upon the defendant to prove his affirmative defense by a beyond-a-reasonable-doubt standard, but also indicates that the People do not have the burden of proving the defendant's guilt by such a standard in felony murder cases. Therefore, the Court gave the false impression to the Jury that in felony murder cases, when the defendant asserts an affirmative defense, the prosecution does not retain the overriding burden of proving every element of the crime charged beyond a reasonable doubt. The Court used this language, on more than one occasion in its charge:

> "The People have the burden of proof beyond a reasonable doubt except in certain instances." (A163, 164). (Felony murder cases when an affirmative defense is asserted)
> (Emphasis Supplied)

It is certainly clear that these combinations of errors by the Trial Court cannot withstand the test enunciated under In Re Winship.

A review of two recent Supreme Court cases will further justify a reversal of this conviction. Cool v. United

States, supra, and Mullaney v. Wilbur, supra, refine the Winship doctrine by applying the Winship rule to erroneous Jury instructions. These cases lend further support to Petitioner's argument that the Trial Court's instructions violated his due process rights.

In Cool v. United States, supra, a witness testified on behalf of the defense. This witness indicated that he was guilty of the crime upon which the defendant was charged and that although the defendant was present with him during his own attempted escape, the defendant himself did not commit any act of wrongdoing. The Jury was instructed by the Judge that they could ignore such testimony unless the Jury believed beyond a reasonable doubt, that this testimony was true.

The United States Supreme Court had to resolve whether there was an unacceptable risk that such an instruction could have been understood by the Jury to mean that this defense testimony could only be considered if believed beyond a reasonable doubt. The United States Supreme Court found that this instruction created an impermissible artificial barrier to a proper assessment of the defendant's defense and therefore, the instruction was found to be fundamentally inconsistent with the decision in Winship. The Court reasoned that the Jury might have understood this instruction as requiring the defense testimony to be considered only if believed beyond a reasonable doubt.

The language in the Cool Court is instructive:

> "It is possible that (defense) testimony would have created a reasonable doubt in the minds of the Jury, but that it was not considered because the testimony itself was not believable beyond a reasonable doubt. By creating an artificial barrier to the consideration of relevant defense testimony putatively credible by a preponderance of the evidence, the trial judge reduced the level of proof necessary for the Government to carry its burden. Indeed, where, as here, the defendant's case rests almost entirely on accomplice testimony, the effect of the judge's instructions is to require the defendant to establish his innocence beyond a reasonable doubt. Because such a requirement is plainly inconsistent with the constitutionally rooted presumption of innocence, the conviction must be reversed..."

The Trial Court in Robinson also created an artificial barrier for the Jury in assessing Robinson's defense. Instead of allowing the Jury to consider Robinson's denials on its merits, the Court in effect told the Jury that Robinson's defense could only be assessed in respect to the murder charge since Robinson had admitted his culpability to the underlying felony.

Thus, the evil contemplated in Cool, that the Jury might discard the defendant's evidence "out of hand" which possibly would have given rise to a reasonable doubt concerning the defendant's guilt was the exact problem in our case. In both cases, there was "an unacceptable risk" that defense testimony would be discarded because of the Court's instruction. In both cases, the truth finding function of the Jury was violated.

Also, in Wilbur, Mullaney, supra, the Supreme Court examined the permissibility of placing certain burdens upon a defendant in a criminal trial. The specific question in Wilbur was whether, in a murder charge, making the defendant negate "malice afore-thought" by a preponderance of evidence runs afoul of the constitutional safeguards mandated In Re Winship. In the Wilbur case, the defendant admitted that he struck the deceased in the heat of passion provoked by an indecent homosexual overture and therefore, he had not acted with malice afore-thought and thus was not guilty of the murder charge. The Jury was instructed that "malice afore-thought" is an essential and indispensable element of the crime of murder without which the homicide would be manslaughter and that "if the prosecution established that the homicide was both intentional and unlawful, malice afore-thought was to be conclusively implied unless the defendant proved by a preponderance of the evidence that he acted in the heat of passion or with sudden provocation."

The United States Supreme Court held that the Maine Statute did not comport with the requirements of the due process clause of the Fourteenth Amendment because it mandated that the defendant prove that he acted in heat of passion in order to reduce the homicide charge to manslaughter. In comparing the Wilbur case to In Re Winship, Justice Powell found that the constitutional impediment found in Wilbur was even more serious than that found in Winship.

The Court explained that:

> "In Winship, the ultimate burden of persuasion remained with the prosecution, although the standard had been reduced to proof by a fair preponderance of the evidence. In this case, by contrast, the State has affirmatively shifted the burden of proof to the defendant. The result, in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous murder conviction."

In the instant case, Robinson testified to exculpate himself from all the charges in the indictment. Yet, the Court twisted this defense in its charge by instructing the Jury that Robinson had asserted an affirmative defense, and therefore, in order for him to prevail he must prove his affirmative defense. This instruction nullified and negated the overall burden of the Prosecution of proving the defendant's guilt beyond a reasonable doubt. It shifted the burden upon the defendant to prove the truth of his denials. It is conceded that the constitution allows some proof burdens to be placed on the accused, but when they become too "onerous, central or non-traditional", they run afoul of the notion that it is up to the state to prove guilt not the defendant to prove his innocence.

Indeed, there can be no greater denial of due process than to shift the burden upon the defendant to prove a defense which he never in fact asserted. DeJonge v. Oregon, 299 U.S. 353, 362, 81 L. Ed 278, 57 S. Ct. 255 (1936) Cole v. Arkansas, 333 U.S. 196, 92 L. Ed. 644, 68 S. Ct. 514 (1946).

Not only did the Court erroneously indicate to the Jury that the defendant asserted an affirmative defense and therefore placed upon him the burden of proving his innocence, but it magnified this error by compelling him to prove his defense by proof beyond a reasonable doubt.[8] For example, in the charge to the Jury, the Court in explaining the affirmative defense stated:

> "On the other hand, if you are satisfied beyond a reasonable doubt that he was there, that he intended to participate, but he did not know that one of his fellows was armed -- and there was no proof that he, here, himself committed a homicide -- no proof that he was armed but he must prove that he had no reasonable ground to believe that any other participant was armed and that he had no reasonable ground to believe that any other participant intended to engage in this conduct. The burden of proving that is on him."

This inexcusable error finally put to rest the defendant's cloak of innocence which had purportedly surrounded him at the outset of the Court's charge. Hence, the basic concept of fairness which embodies the due process clause of the Fifth and Fourteenth Amendments was completely destroyed by this portion of the charge.

8. The Court further confused the Jury by placing before them two different standards of proof for the affirmative defense. The Court first indicates that the defendant must prove his affirmative defense by preponderating proof and then as indicated instructs the Jury that the defendant's burden of persuasion is by proof beyond a reasonable doubt.

The whole theory behind the presumption of innocence rationale is to require the State to prove its case. An instruction to the Jury which effectively diminishes this presumption and facilitates convictions runs counter to our system of criminal justice. Here, the Court effectively diminishes this presumption by erroneously instructing the Jury that the defendant had asserted an affirmative defense. As was demonstrated, once this was done, the Jury had no choice but to convict the defendant for the underlying felony.

Thus, the truth finding function of the Jury was impermissibly invaded by this charge, which in turn reduced the State's burden of proving the defendant's guilt beyond a reasonable doubt. These errors deprived the defendant of his rights under the due process clause of the United States Consitution, which should mandate that this Honorable Court reverse this conviction.

POINT II

EVEN IN THE ABSENCE OF AN EXCEPTION TO THE TRIAL COURT'S CHARGE, THIS COURT CAN REVIEW THIS APPEAL WHEN THE PREJUDICIAL ERROR COMMITTED BY THE TRIAL COURT AMOUNTS TO A DEPRIVATION OF A FUNDAMENTAL AND CONSTITUTIONAL RIGHT OF A DEFENDANT

The New York Court of Appeals in its opinion in People v. Robinson, 36 N.Y. 2d 224 (1975), indicated that it was constrained not to reverse Robinson's conviction inasmuch as the trial counsel did not register an exception to the Trial Court's erroneous charge. Associate Justice Wachtler voiced his dissent from that Court's opinion and reasoned that an exception was not necessary in order for that Court to review the conviction since the error committed by the Trial Judge deprived the Petitioner of fundamental constitutional rights. Justice Wachtler citing the In Re Winship opinion, supra, indicated that the error violated the due process clause of the United States Constitution and was fundamental error and therefore the conviction should be reviewed even in the absence of an exception to the charge. It is respectfully urged that this Honorable Court follow the reasoning of Justice Wachtler and find that the error committed by the Trial Court did amount to a deprivation of fundamental constitutional rights.

The United States Supreme Court has defined fundamental error as that "which offends some principle of Justice so rooted in the tradition and conscience of our people to be ranked as

fundamental." Snyder v. Commonwealth, 291 U.S. 97, 105, 54 S. Ct. 330, 70 L. Ed. 674 (1934). In this case, it is quite evident that the historically grounded rights spoken about in Snyder v. Commonwealth, supra, were violated by the Court's charge.

A fundamental error was committed when the Trial Court informed the Jury that the defendant had interposed an affirmative defense and that in order for the defendant to prevail, he would have to prove this defense. By such an instruction, the Jury was expressly informed by the Court that the defendant had admitted his involvement in the underlying felony and therefore he must come forward to exculpate himself from the murder charge by proving his "affirmative defense". The "Due Process" impediment in such a charge is that the Trial Court infringed upon the absolute right of a defendant in a criminal trial to be presumed innocent of the charges against him, that it invaded the basic truth finding function of the Jury and that it improperly allocated and diminished the burden of proof at the trial. It placed upon the defendant the burden of proving the truth of his denials, which by a necessity, eliminated the Prosecution's burden of proving the defendant's guilt beyond a reasonable doubt.

The fact that a State Court did not review an appeal because an exception was not taken does not preclude a Federal Court's

review when the error committed violates a fundamental constitutional right. In O'Connor v. Ohio, 385 U.S. 92, 17 L.Ed 2d 189, 87 S. Ct. 252 (1971), the United States Supreme Court expressly held that the failure to object in a State Court cannot bar the Petitioner from asserting a Federal Right. See also: Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); McLeoud v. Ohio, 378 U.S. 582, 12 L. Ed 2d 1037, 84 S. Ct. 1922 (1964); Screws v. United States, 325 U.S. 91, 107 65 S. Ct. 1031, 89 L. Ed 2d 1495 (1945); United States ex rel West v. Lavalle, 335 F.2d 230 (2nd Cir. 1964).

In Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), the United States Supreme Court questioned whether State or Federal Law governs the determination of what constitutes harmless error. The United States Supreme Court concluded that the Federal Courts had the obligation of reviewing errors of the State Courts where deprivation of guaranteed federal rights were at issue. The Court stated:

> "Whether a conviction for a crime should stand when a State has failed to accord federally constitutionally guaranteed rights is every bit as much of a Federal question as what particular federal constitutional provisions themselves mean, what they guarantee and whether they have been denied. With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of authorative laws, rules and remedies designed to protect people from infractions by the States of Federally guaranteed rights."

In our Federal Courts, under "federal standards", no objection or exception is necessary to preserve for Appellate review a deprivation of a constitutional right. United States v. Birmingham, 447 F. 2d 1313 (10th Cir. 1971); United States v. Howard, 506 F.2d 1131 (2d Cir. 1974); United States v. Fields, 466 F. 2d 119 (2nd Cir. 1972); Polansky v. United States, 332 F. 2d 233 (1st Cir. 1960).

Polansky v. United States, supra, sets forth the following reason for overlooking non-compliance with the "exception rule":

> "In those exceptional circumstances where notice of an error is necessary to avoid prejudicing in a substantial manner appellant's right to a fair trial, the reviewing court must necessarily, though reluctantly, dispense with the requirement and policy of the rule."

Recently, this Court, in United States v. Pugliese, 346 F. 2d 861 (2d Cir. 1965), had to pass upon an error in a charge by a Trial Court in respect to the affirmative defense of entrapment. This Court had to decide whether the Trial Court committed plain error affecting substantial rights, when the Court did not explicitly define that the defendant's burden was less than beyond a reasonable doubt in an entrapment case. This Court found that it was plain error and would review the case even though no exception was taken to this portion of the charge. At page 864, the Court stated:

"No legal authority has imposed a heavier burden on a defendant for any aspect of the entrapment issue then proof by a preponderance of the evidence.

"We would not increase this burden on the defendant (if indeed he should bear any burden or proof whatever, a question we do not now reach). However, as the trial Judge never expressly delineated defendant's 'burden of proof' the jury might have thought that he meant proof beyond a reasonable doubt.

"Under these circumstances we hold that the trial Judge committed 'plain errors' affecting substantial rights; plain because the defendant is not obligated to prove 'inducement' beyond a reasonable doubt (if indeed he bears any burden of proof whatever on the issue), and substantial because the case was very close, the jury quite likely understood 'inducement' not narrowly but as encompassing the crucial issue of improper pressure."

The Pugliese Court quoted approvingly from Goren v. United States, 313 F.2d 654 (2d Cir. 1956):

"The only burden of proof mentioned anywhere in the charge was the burden on the government to prove the essential elements of its case beyond a reasonable doubt. But from this we cannot assume, as the government argues, that the jury would apply this standard only to the government's case and never to defendant's. On the contrary, we think that since proof beyond a reasonable doubt was the only standard mentioned, the jury would naturally infer in the absence of instruction otherwise that when 'burden of proof' was mentioned that was the standard they were to apply, not only to the government, but also the defendant."

The error committed in the instant case is even more devastating than the one found in Pugliese. In our case, the Petitioner did not have any burdens of proof at trial, yet the Jury was instructed that in order for the defendant to prevail he had the burden of proving his affirmative defense. The Jury was also instructed that the defendant must prove this defense by preponderating proof and then instructed that the defendant's burden of persuasion is by proof beyond a reasonable doubt. The Jury was not clearly instructed that the overall burden of establishing the guilt of the defendant beyond a reasonable doubt never shifts from the Prosecution. Davis v. United States, 160 U.S. 469, 485-89, 16 S. Ct. 353, 40 L. Ed. 499 (1895). Therefore, this Court should also find that this error was plain error under federal standards and grant the Petitioner's habeas corpus relief.

The purpose of the rule requiring an exception be taken by counsel is that it affords an opportunity to the Trial Court to correct any possible mistakes before it submits the case to the Jury. Wigmore Evidence 3rd Edition, Section 18. However, the purpose of the rule is not served or furthered where, as here, the mistake was so flagrant as to affect a fundamental constitutional right and prejudice the defendant in an irreparable manner where any attempt to correct the error would have been a futile act. DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962). The comments by the Court on the Affirmative Defense were so

direct and egregious that a later curative instruction would not have been beneficial. This charge had the devastating effect of implanting in the minds of the Jury the belief that the Trial Judge was of the opinion that the defendant had admitted his guilt to the underlying felony. The damage was irreparable the moment the Judge conveyed this impression to the Jury. A further Jury instruction would not cure the harm already occasioned by this patent error.

In United States v. Leviton, 193 F. 2d 848 (2d Cir. 1951), cert. den. 343 U.S. 946, 96 L. Ed. 1350, Judge Frank analyzed the old ritualistic admonition to purge the record and discussed the impossibility of later eliminating from the minds of the jurors poison introduced by a Trial Judge. He wrote, in dissenting, that, "The futility of that sort of exorcism is notorious. As I have elsewhere observed it is like the Mark Twain story of the little boy who was told to stand in a corner and not to think of a white elephant." 193 F. 2d at 865. Justice Jackson shared Judge Frank's view when he wrote in Krulewitch v. United States, 336 U.S. 440, 453, 93 L. Ed.790, (1948) that "The naive assumption that prejudicial effects can be overcome by instructions to the Jury *** all practicing lawyers know to be unmitigated fiction."

In Mara v. United States, 190 F.2d 794, 752-753 (5th Cir. 1951), Chief Justice Weick speaking for the Court remarked,

> "It must be remembered that after the saber thrust, the withdrawal of the saber still leaves the wound".

A Court can seldom be sure when an error communicated to the Jury was so prejudicial as to deprive a defendant of a substantial right. In such cases a Court should resolve any doubt in favor of the defendant. However, when, as here, the error affects a fundamental constitutional right of a defendant, this Court must exercise its discretionary power and reverse this conviction even though no exception was taken to the charge.

CONCLUSION

FOR ALL OF THE ABOVE REASONS, THIS HONORABLE COURT SHOULD GRANT THE HABEAS CORPUS RELIEF REQUESTED BY THE PETITIONER.

Respectfully submitted,

RONALD M. KLEINBERG
Attorney for Petitioner
575 Lexington Avenue
New York, New York 10022

KLEINBERG US v. Warden 2172

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 30 day of April , 19 76 at No. 2 World Trade Center, NYC deponent served the within Brief upon Hon. Louis J. Lefkowitz, Atty. General the Appellees herein, by delivering ~~a true~~ 3 true copies copy thereof to h impersonally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appeleles therein.

Sworn to before me,
this 30day of April 19 76

.....
Edward Bailey

.....
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, ~~1978~~ 1977